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No. 84-1044

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF *AMICI CURIAE* PACIFIC NORTHWEST BELL TELEPHONE COMPANY, PACIFIC POWER & LIGHT COMPANY, AND OREGON INDEPENDENT TELEPHONE ASSOCIATION IN SUPPORT OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY'S JURISDICTIONAL STATEMENT

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January 24, 1985

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INTERESTS OF *AMICI CURIAE*

Appellant Pacific Gas and Electric Company ("PGandE") filed a jurisdictional statement with this Court seeking review of California Public Utilities Commission ("CalPUC") Decision No. 83-12-047, as modified by Decision No. 84-05-039 (collectively, "Decisions"). The Decisions require PGandE to give to TURN, a private association purportedly representing the interests of PGandE's residential customers, free access to "extra space" within PGandE's billing envelopes. No court has heretofore reviewed the Decisions, for in early October, the Supreme Court of the State of California denied PGandE's petition for a writ of review. Because of the importance of the questions involved in the PGandE appeal, Pacific Northwest Bell Telephone Company ("PNB"),

Pacific Power & Light Company ("Pacific Power"), and Oregon Independent Telephone Association ("OITA"), through their counsel, requested and received consent from all parties to the proceedings below to submit this brief in support of PGandE's jurisdictional statement.

Amicus PNB is a Washington corporation providing telephone service to local exchange customers located in Oregon, Washington, and Idaho. Over 700,000 of its customers are located in Oregon. On November 6, 1984, the Oregon electorate enacted an initiative measure, popularly referred to as Ballot Measure 3. The text of Ballot Measure 3 is reprinted in the appendix to Appellant PGandE's jurisdictional statement ("App.") at A-142 through A-150. Ballot Measure 3 creates a private, nonprofit organization known as the "Citizens' Utility Board" ("CUB"), and requires, *inter alia*, that Oregon investor-owned utilities such as PNB allow the CUB to insert its material in such utilities' billing envelopes up to six times per year, all at no cost to the CUB so long as the weight of the CUB material does not exceed .4 ounce. Ballot Measure 3 at Sections 10-11; App. at A-147 and A-148. Moreover, Sections 12 and 17 of Ballot Measure 3 make "discourag[ing] the distribution of [CUB] material" a Class A misdemeanor, App. at A-149 and A-150, which under Oregon law is punishable by up to a year's imprisonment and a fine of up to $5000. Or. Rev. Stat. §§ 161.635, 161.655. While it is likely that the CUB will use the space in the utilities' billing envelopes in a manner adverse to the utilities' interests, Ballot Measure 3 imposes virtually no restrictions upon the use the CUB can make of the .4 ounce.

Amicus Pacific Power is an assumed business name for the electric operations portion of PacifiCorp, a Maine corporation. Pacific Power provides retail electric service in California, and accordingly is regulated by Appellee CalPUC. Therefore, the precedent established in this proceeding may directly affect Pacific Power's California electric operations. Pacific Power also provides retail electric service to customers located in Oregon, Washington, Idaho, Montana, and Wyoming. Because of its Oregon electric operations, Pacific Power, like PNB, is subject to the provisions of Oregon's Ballot Measure 3. In addition, there was recently pending before the Montana Public Service Commission, the state regulatory authority which governs Pacific Power's Montana retail operations, the question of whether that regulatory body has authority sufficient to allow it to require investor-owned utilities operating in Montana, including Pacific Power, to allow a newly-formed entity, calling

itself "Montana CUB," free access to the "extra space" in such utilities' billing envelopes. Because the Montana Commission determined that it lacked authority under state law to require utilities to make extra space in billing envelopes available to third parties, the issue of the constitutionality of such a requirement was not addressed. Montana Public Service Commission Order No. 5107 (December 24, 1984). In light of this disposition, it seems certain that the question of Montana CUB access to Montana utilities' billing envelopes will be presented to the 1985 session of the Montana Legislature.

OITA is an Oregon nonprofit association composed of independent investor-owned and cooperative telephone utilities. Most of the members of OITA are subject to the provisions of Oregon's Ballot Measure 3, discussed above.

A decision from this Court invalidating the Decisions would eliminate the California administrative precedent which could otherwise be injurious to *Amicus* Pacific Power's California electric utility operations. In addition, because even a brief perusal of Oregon's Ballot Measure 3 establishes that it is at least as constitutionally infirm as the Decisions which are the subject of the instant appeal, a decision on the merits in favor of Appellant PGandE would terminate the controversy surrounding Ballot Measure 3, which controversy directly and immediately affects all *Amici*. Finally, a decision in favor of PGandE would eliminate the pending Montana legislative confrontation over the ultimate question of Montana CUB's access to that state's utilities' billing envelopes.

SUMMARY OF ARGUMENT

This Court should exercise jurisdiction over this appeal because fundamental and pervasive constitutional values are at stake. Moreover, in the absence of such exercise, a state administrative agency's decision affecting those values will become the law of the land and have consequences of nationwide significance without any judicial scrutiny whatsoever. Addressing the substantive concerns, *Amici Curiae* urge that the Decisions are unconstitutional because (1) they compel PGandE to subsidize the dissemination of political views hostile to PGandE's interest in contravention of the first amendment, and (2) they result in the taking of PGandE's property without just compensation in violation of the fifth and fourteenth amendments.

ARGUMENT

It is disquieting that the parties must seek from this Court initial judicial review of the fundamental and substantial constitutional questions created by the Decisions. That the California state court system has avoided its role heightens the need for this Court to grant judicial review — if such review is denied, it will mean that a state administrative agency's resolution of basic and pervasive first and fifth amendment issues will become the law of the land without even so much as a formal judicial examination.

Basic first amendment questions have been raised and are properly before this Court — issues such as whether a private organization can, under the guise of state utility regulation, obtain the right to invade a private utility's sealed postage envelopes in order to espouse causes directly inimical to the utility's interests. There is also a first amendment issue involving both preemption of state law and selective advancement of political views based upon identity of the speaker; that issue is whether Congress, by passing the Public Regulatory Policies Act of 1978, 92 Stat. 3117, intended to allow states to prefer the dissemination of views antithetical to utility interests over the utilities' own views, all in the utilities' own vehicles of communication. Finally, the Decisions

have triggered basic fifth and fourteenth amendment issues, such as whether personal property which has long been devoted to an exclusively private use may be commandeered by the state and turned over to a second, private, use hostile to the owner's interest, all without offer (let alone payment) of just compensation. *Amici* submit that the Decisions cannot withstand scrutiny under any of these constitutional guarantees.

I

THE DECISIONS VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The first amendment, made applicable to the states through the fourteenth amendment, provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." The Decisions violate this most fundamental of guarantees in a number of respects. First, they force the utility to become the medium by which another's message is carried, in violation of the principle most recently espoused in *Wooley v. Maynard*, 430 U.S. 705 (1977). In that situation, this Court declared that, in the absence of a compelling state interest, the state could not force private entities — motorists — to display on their own private property ideological messages repugnant to the owner. In contradistinction to *Wooley*, however, the Decisions require PGandE to disseminate political views selected *because of* their hostility to PGandE's own. Moreover, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court invalidated a state statute requiring newspapers to grant reply space to candidates criticized in print. In contrast to the political candidate under editorial attack in *Tornillo* or the interest of the state in proclaiming its motto in *Wooley*, TURN cannot point to even an arguably valid state interest; indeed, it appears that TURN has been able to function effectively for many years without having been given free access to utility billing envelopes.

The second basis for invalidation of the Decisions on freedom of speech grounds is that PGandE is compelled to subsidize the dissemination of TURN's political views. Such compelled subsidization contravenes the principles enunciated in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In that case, this Court voided a state requirement

that individuals provide monetary support for a union's political actions not related to acting as the employees' exclusive bargaining agent. In essence, *Abood* stands for the proposition that an entity cannot be required to underwrite the expression of political views with which it does not agree. The case for judicial intervention in the current controversy is, if anything, significantly stronger than the case for intervention in *Abood;* here, PGandE is being compelled to underwrite views *intended* to be adverse to PGandE's interests.

The third freedom of speech claim created by the Decisions is that they produce unlawful discrimination against utilities' expression of views. Under Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117, electric utilities are prohibited from charging their customers for utilities' "political" advertising. However, the Decisions apparently require "extra" space in billing envelopes to be made available for TURN's political advertising purposes *because* such space is assumed to be chargeable to customers as a prudent expense for ratemaking purposes. Thus, the result of the Decisions is to discriminate on the basis of *whose* views are being advanced, and to allow only the anti-utility voice to be subsidized with ratepayer funds — even though the *utility* owns the envelope and paid for the postage. Similar content-based regulation of speech was invalidated in *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980); it should be set aside here as well.

II

THE DECISIONS VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The fifth amendment provides, "[N]or shall private property be taken for public use, without just compensation." Questions of "taking" under constitutional norms involve at least three essential determinations: (1) whether private property is involved, (2) whether a "taking" of such property has occurred, and (3) whether "just compensation" has been paid.

First, there is no question that utility private property is involved; PGandE funds purchase the envelopes, postage, and billing equipment. That costs related to billing envelopes, postage, and similar items are normally allowed to be charged to customers for ratemaking purposes does not render such property "public." As the Court stated as early as 1923, "the State . . . is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership." *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 288. Three years later, the Court held that customers do not acquire an interest in property simply because they pay the utility bills. *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 32 (1926). Indeed, in *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980), this Court continually referred to utility billing envelopes as private property. *Id.* at 532, 540. Accordingly, existing caselaw settles the matter: Utility billing envelopes are the property of the utility, *not* the state, and *not* the utility's customers. Thus, the first criterion of a fifth amendment violation — the existence of private property — is present in this case.

It is also clear that the Decisions constitute a "taking" of private utility property. For example, in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Court indicated that physical invasion of property is usually sufficient to constitute a taking. *Id.* at 124. Certainly state-enforced insertion of hostile material in a utility's billing envelope is such an invasion. Even more recently, the Court in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), held that an entity which had used its funds to develop a project could not be required to allow public access to the project without payment of just compensation. In its decision, the Court held that the "right to exclude," which

is universally acknowledged as a fundamental element of property rights, may not be taken without just compensation. *Id.* at 179-80.* Because neither TURN nor CalPUC has made even an offer of compensation, just or otherwise, the Decisions fail to meet the criteria of constitutionality under the fifth amendment.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Pacific Northwest Bell Telephone Company, Pacific Power & Light Company, and Oregon Independent Telephone Association urge this Court to consider the merits of the Decisions, and either (1) to set the case down for oral argument, or, alternatively, (2) to reverse the Decisions summarily.

Respectfully submitted,

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* In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that no taking occurs when the state prohibits barring political speech and debate on shopping center premises. In making this determination, the Court examined the owner's investment expectations, and held that investors' expectations would not be upset by allowing the use challenged. *Id.* at 83. Of course, utility investors' expectations *would* be upset by allowing TURN access to PGandE's billing envelopes, particularly when the purpose of such access would include the *decrease* of the returns to such investors.